Commentary: District Court Cases

Cunningham v. Cunningham, 237 F. Supp. 3d 1246 (M.D. Fla. 2017)

Other District Court Cases

Marquez v. Castillo,
72 F. Supp. 3d 1280 (M.D. Fla. 2014)

Habitual Residence of Infants | Wrongful Retention | Delay and Settlement of Child

Facts

Father, an American serviceman stationed in Japan, met mother, a Japanese citizen, in Okinawa. They married in May 2014. Neither spoke the other's language. Mother became pregnant. In March 2015, father, mother and her teenage son from another relationship relocated to the United States. Father made arrangements for on-base housing in Fort Detrick, Maryland. The marital relationship deteriorated rapidly. Mother made claims that father was not providing her with sufficient food and was physically abusive. Three weeks after her arrival in the United States, and with the assistance of father and the Army command, mother and her teenage son returned to Japan.

The child was born in July 2015 in Okinawa. On September 18, 2015, mother, her teenage son, and the infant flew to the United States, joining father on the base. On October 9, 2015, the family traveled to Florida to attend a family wedding. Following a significant argument, mother insisted on returning to Japan. After a second altercation, mother was arrested for domestic violence.

Hearings were held in state court and the child was placed with paternal grandmother. Mother and her teenage son returned to Japan. Father obtained a state court judgment of dissolution of the marriage and was awarded sole custody of the child. On October 26, 2016, mother filed a petition for return under the 1980 Hague Convention in the Middle District of Florida.

Discussion

The court addressed the following issues: (1) the role of parental intent in fixing the habitual residence of an infant, (2) the relevance of foreign law (of the country of a child's habitual residence) to a determination of wrongful retention, and (3) whether a child under the age of two can become "settled" in a new environment.

The district court granted mother's petition for return of the child to Japan. The court noted that the facts of the case were difficult to ascertain due to limited evidence and a finding that the testimony of both parents was "remarkably untruthful." The court nevertheless undertook an in-depth analysis of the evidence that was presented.[1]

1. *See* Barzilay v. Barzilay, 600 F.3d 912, 920 ("[D]etermination of habitual residence under the Hague Convention is a fact intensive inquiry particularly sensitive to the perspective and circumstances of the child.").

Habitual Residence. The court ruled that the child's habitual residence was Japan. The court noted that the *Mozes v. Mozes*[2] analysis followed by the Eleventh Circuit was not relevant because *Mozes* addresses a change in habitual residence rather than an infant's initial acquisition of a habitual residence. The court reviewed principles cited by other courts to determine the habitual residence of infants: (1) place of birth does not automatically become the child's habitual residence;[3] (2) a mother's habitual residence does not automatically become the child's habitual residence;[4] (3) acclimatization of the child is not relevant because an infant lacks the ability to become acclimatized.[5]

The court focused its analysis on whether the parties had a shared intent for where the child would live. The evidence showed that the parties were initially in agreement that the child would be raised in the United States, but that after the rapid deterioration of the marital relationship before the child's birth, father agreed to, and assisted with, mother's return to Japan.

Mother's return to the United States with the newborn child in 2015 was an attempt at reconciliation. However, the court found that both parents agreed mother and child would return to Japan if reconciliation failed.

Wrongful Retention. Father argued that under Japanese law, when he removed the child from mother after the altercation of October 9, 2015, he did not breach her custody rights. Experts in Japanese law testified that domestic parental abduction in Japan is not illegal. The court rejected father's argument, holding that

> from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, *not from some action in breach of a particular law*, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise.[6]

The court found that even if father's actions in retaining the child were not in violation of Japanese law, his violation of mother's jointly held custody rights was wrongful within the meaning of the 1980 Hague Convention.

Delay and Settlement of the Child. Father also argued that mother's delay in filing her application for return could be raised as a defense and that the child was now settled in the United States. The court noted that Eleventh Circuit rulings were inconsistent on

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2. 239 F.3d 1067 (9th Cir. 2001).

3. Cunningham v. Cunningham, 237 F. Supp. 3d 1246, 1265 (M.D. Fla. 2017) (citing McKie v. Jude, No. 10-103-DLB, 2011 WL 53058, at 10 (E.D. Ky. 2011) (citing Holder v. Holder, 392 F.3d 1009, 1020 (9th Cir. 2004) and Delvoye v. Lee, 329 F.3d 330, 334 (3d Cir. 2003)); Uzoh v. Uzoh, No. 11-cv-09124, 2012 WL 1565345, at 5 (N.D. Ill. 2012) (citing Kijowska v. Haines, 463 F.3d 583, 587 (7th Cir. 2006))).

4. *Id.* (citing *Delvoye*, 329 F.3d at 333; *In re* A.L.C., 607 Fed. App'x 658, 662 (9th Cir. 2015); *Kijowska*, 463 F.3d at 587; Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 379 (8th Cir. 1995)).

5. *Id.* (citing Redmond v. Redmond, 724 F.3d 729, 746 (7th Cir. 2013) (quoting Karkkainen v. Kovalchuk, 445 F.3d 280, 287 (3d Cir. 2006)); *Holder*, 392 F.3d at 1020–21; Simcox v. Simcox, 511 F.3d 594, 602 n. 2 (6th Cir. 2007); and Whiting v. Krassner, 391 F.3d 540, 550 (3d Cir. 2004)).

6. *Id.* at 1273 (quoting Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, *in* 3 Acts and Documents of the Fourteenth Session 426, 447–48 ¶ 71 (1982) (emphasis added); also citing Ozaltin v. Ozaltin, 708 F.3d 355, 368–70 (2d Cir. 2013) ("[A] removal under the Hague Convention can still be 'wrongful' even if it is lawful.")).

whether a parent with physical custody of a child can claim wrongful retention[7] and also noted that it was not necessary to reach a conclusion on this issue because the child had not become settled within the meaning of Article 12.[8]

Reviewing the factors ordinarily considered relevant when determining whether a child has become "settled" in a new environment,[9] the court found that the eighteen-month-old child was stable in her grandparents' home, significantly bonded to her grandparents, not subject to deportation, was well-adjusted, happy, and healthy, and that the family was financially stable.

However, the court found that the child's very young age precluded her from forming meaningful attachments to the community (such as church, school, or community activities). The court noted the dearth of legal authority to support a conclusion that a child under two years of age can become well-settled, citing in fact that in one case a judge found that "children of such tender years are too young 'to allow meaningful connections to the new environment to evolve.'"[10] Finding this observation persuasive, the court ruled that the evidence failed to demonstrate that the very young child had "substantial and meaningful connections to Florida."[11]

7. Pielage v. McConnell, 516 F.3d 1282, 1289 (11th Cir. 2008), held that a state court order that prohibited the removal of a child from the state was not a wrongful retention, since the mother who was petitioning for return of the child to the Netherlands still had physical custody of the child; but see Sewald v. Resinger, No. 09-10563, 2009 U.S. App. LEXIS 29458 (11th Cir. Nov. 19, 2009), where father's withholding of the child's passport, which prevented mother from returning to Germany with the child, was sufficient for a finding of wrongful retention.

8. Article 12 states in part that "[w]here a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

9. *Cunningham*, 237 F. Supp. 3d, at 1281 ("Generally, courts consider . . . '(1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability.'" (quoting Fuentes-Rangel v. Woodman, 617 Fed. App'x 920, 922 (11th Cir. 2015) (quoting In re B. Del C.S.B., 559 F.3d 999, 1009 (9th Cir. 2009))).

10. *Id.* at 1282 (quoting Moreno v. Martin, No. 08-cv-22432-CIV, 2008 WL 4716958, at *21 (S.D. Fla. Oct. 23, 2008) (quoting *In re* Robinson, 983 F. Supp. 1339, 1345 (D. Colo. 1997) and Riley v. Gooch, Civ. No. 09-1019-PA, 2010 WL 373993, at *11 (D. Or. 2010))).

11. *Id.* at 1282–83.